IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 959 of 1990

with

CRIMINAL APPEAL No 1075 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CRIMINAL APPEAL NO. 959 OF 1990 :

DILIP AMRUTLAL PANDYA - Appellant
(orig. Accused No.2)

Versus

STATE OF GUJARAT - Respondent

CRIMINAL APPEAL NO. 1075 OF 1990 :

STATE OF GUJARAT - Appellant
versus
NATU DEVJI NAT - Respondent

(Orig. Accused No.1)

Appearance:

1. Criminal Appeal No. 959 of 1990

MR BK DAVE FOR MR BR KYADA for Appellant
MR KG SHETH, APP for Respondent - State

2. Criminal Appeal No. 1075 of 1990

MR KG SHETH, APP for Appellant - State
MR MN JOSHI FOR MR PM THAKKAR for Respondent

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 30/07/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. These two appeals arise from the judgement and order dated 29th September 1990 of the learned Additional Sessions Judge, Gondal in Sessions Case No. 1 of 1990, by which while acquitting the original accused No.1 Natu Devji, the Court convicted the original accused No.2 Dilip Amratlal for the offence under section 302 of the Indian Penal Code sentencing him to life imprisonment and to pay a fine of Rs.2,000=00, in default to undergo further rigorous imprisonment for three months. The accused No.2 was also convicted for the offence under section 135 of the Bombay Police Act and sentenced to pay a fine of Rs.500=00, in default to undergo simple imprisonment for fifteen days. Criminal Appeal No. 959 of 1990 has been preferred by the original accused No.2 Dilip Amratlal against the said decision, while the Criminal Appeal No. 1075 of 1990 has been preferred by the State against the acquittal of the original accused No.1 - Natu Devji.

2. The prosecution version was that, on 20th November 1989 in the evening around 8 o'clock, these two accused persons armed with sharp cutting instruments intentionally caused knife injuries to Vasumal Ramjibhai resulting in his death and thereby, committed an offence under section 302 of the Indian Penal Code. In the alternative, according to the prosecution, both the accused acted in aid of each other and in furtherance of their common intention to murder Vasu, they caused the

knife injuries to him which resulted in his death and thereby, they were guilty of the offence under section 302 read with section 34 or section 114 of the Indian Penal Code.

2.1 According to the prosecution, there was a quarrel between these accused persons and the elder brother of the deceased Parshottam, who was repairing the watches about a week prior to this incident over the repairs of a watch given by the accused No.2. Vasu thereupon had a quarrel with both the accused persons. At the relevant time, Vasu and his friend Mohan were walking on the road and both the accused came in an auto-rickshaw driven by one of them and halted it near Vasu. According to the prosecution, both the accused attacked Vasu and caused knife injuries to him.

2.2 It is the prosecution case that, as per the First Information Report, Bhagvandas who was also the elder brother of Vasu, had seen the accused No.1 with a knife standing near the auto-rickshaw when Vasu was lying on the ground and after the assailants went away in that auto-rickshaw, he was told by Vasu that the accused No.1 had given him a knife blow. After Bhagvandas went to fetch an auto-rickshaw for taking Vasu to the hospital, Mohan and other witnesses had carried Vasu to his house which was nearby and at that time, Vasu had on being asked told witnesses Pappu and Hamir that the accused No.2 - Dilip had given him a knife blow. When Vasu was carried to the hospital, he was declared dead.

2.3 According to the prosecution, both the accused were apprehended together at the railway station on 21-11-1989. The clothes of the accused No.2 Dilip Amratlal which were discovered at his instance, had blood stains, which on analysis was found to be that of `A' positive group, which was the blood group of the deceased Vasu. According to the prosecution, the accused No.2 had also led the police party and panchas to the discovery of a knife which was blood stained, which blood was also of group `A' as per the report of the chemical analyser and the serologist at exh.45 colly. The prosecution case is that both the accused persons were identified at the test identification parade which was held within two days of the incident. Both the accused were serving as door-keepers in Chetna Cinema and on the day of the incident, they had taken half-day leave and at the time of the incident, they acted in a concerted manner for taking revenge against Vasu, who had tried to take the side of his brother Parshottam earlier when these accused persons had quarrelled with Parshottam over the repairs

of a watch which Dilip had given to Parshottam.

3. The trial Court, on the basis of the material on record, found that there was no sufficient evidence to implicate the accused No.1 - Natu and that Bhagvandas who had in his FIR and deposition said that the deceased Vasu had told him that the accused No.1 had given him a knife blow, was not supported by any other evidence. It was held that the accused No.2 - Dilip had given the knife blow which resulted in the death of Vasu and that he was individually liable for the offence that he committed. According to the trial Court, there was no material on record to show that the accused No.1 had shared the intention of the accused No.2 of causing death of Vasu or that the blow was given by the accused No.2 in furtherance of the common intention of both of them. The Court found that there was no reliable evidence to show that the accused No.1 was acting in a concerted manner with the accused No.2.

4. The learned counsel appearing for the original accused No.2 - appellant submitted that the name of the accused No.2 - Dilip was not given in the FIR and as per the version therein and the deposition of Bhagvandas, the accused No.1 was having a knife and no overt act was attributed to the accused No.2 and therefore, the prosecution version regarding the involvement of the accused No.2 in the crime, was highly doubtful. It was submitted that merely because Natu and Dilip were door-keepers together, no inference can be drawn against the appellant - accused. The story of Bhagvandas regarding some other person being present whose name he did not know while naming the accused No.1 should alone be sufficient to acquit the accused No.2. It was also contended that Bhagvandas was an interested witness and it was unsafe to rely upon him so far as the accused No.2 was concerned. He had made material improvements in his version before the Court by implicating the accused No.2 - Dilip, because, in the FIR, he had said that Vasu had named the accused No.1 Natu as the person who had given him a knife blow and there was no mention of the accused No.2 or any other person sitting in the auto-rickshaw as having given him knife blow alongwith the accused No.1, which was the improved version before the court. As regards the eye-witness Mohanlal, the learned counsel submitted that his evidence cannot be relied upon, because, he had not known the accused persons earlier and they were, as admitted by him, shown to him a day prior to the test identification parade. Moreover, he was told by a lawyer as to in what manner he should give deposition. It was submitted that Mohanlal was,

therefore, a tutored witness and he had not seen any blow actually being given to Vasu. It was further submitted that Hamir and Pappu were not the eye witness to the incident and therefore, there was no sufficient evidence to hold the accused No.2 guilty of the offence. It was also argued that the evidence shows that, after the incident, the lights had gone off and therefore, it was not possible for the witnesses who came later on to see the assailants going away in the auto-rickshaw.

4.1 In support of his contentions, the learned counsel relied upon the decision of the Supreme Court in Ram Nath Madhoprasad v. State of Madhya Pradesh, reported in AIR 1953 SC 420 for the proposition that unless one is certain about the exact words uttered by the deceased, no reliance can be placed on verbal statements of the witnesses and the oral declarations made by the deceased. It was held that it was not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration, because, such a statement is not made on oath and is not subject to cross-examination and because, the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination while he was making the declaration. The decision of this Court in Patel Dashrathbhai Atmaram v. State of Gujarat, reported in 1998 (2) GLH 155 in which the above decision of the Supreme Court was followed, was also cited for the same proposition.

5. The learned Additional Public Prosecutor, arguing the acquittal appeal against the accused Natu and also replying to the contentions raised on behalf of the convicted accused Dilip, contended that there was sufficient evidence on record to establish the guilt of both the accused. He submitted that the manner in which they had come together and assaulted Vasu by giving him knife blows and thereafter, run away together in the auto-rickshaw of Dilip's brother which they had brought, was sufficient to establish that there was a prior meeting of minds between both the accused persons for forming their common intention of causing murder of Vasu. It was submitted that the evidence establishes that the accused No.2 Dilip had given a knife blow to Vasu which had resulted in his death, and that the injury was sufficient in the ordinary course of nature to cause death and therefore, the accused No.2 was individually liable for the offence under section 302 of the Indian Penal Code, while the accused No.2 was liable for the offence under section 302 read with section 34 of the Indian Penal Code. It was submitted that Mohanlal was an

eye witness whose account clearly showed that the accused No.2 had given the knife blows to Vasu and the oral dying declaration of Vasu before Pappu and Hamir also showed that it was the accused No.2 - Dilip who had given the knife blows. It was submitted that the discovery of blood stained knife and his blood stained clothes by the accused No.2 were the circumstances which re-assured the prosecution version that the accused No.2 had given the knife blows to Vasu. The blood group which was found on these articles was that of the deceased and that could not have been a coincident, because, the blood group of the accused No.2 was different. It was submitted that there was sufficient motive for the accused persons to attack Vasu, because of the previous incident that had occurred about eight to ten days back and in which on Parshottam being manhandled by the accused persons, Vasu had quarrelled with them in support of his elder brother Parshottam. It was submitted that the oral and documentary evidence on record established beyond any shadow of doubt that both the accused were guilty of the offences with which they were charged.

6. The learned counsel appearing for the original accused No.1 who was acquitted by the trial Court argued that there was no evidence to implicate the accused No.1 apart from the oral dying declaration said to have been made by Vasu to Bhagvandas. It was submitted that no other witness has spoken about Vasu having declared the accused No.1 as the person who had given him a knife blow. According to the witnesses - Hamir and Pappu, Vasu had said that it was the accused No.2 Dilip who had given him a knife blow and had not at all named the accused No.1. Therefore, the version of Bhagvandas, who was an interested witness, that Vasu had declared in his oral dying declaration that the accused No.1 had given him a knife blow, cannot be trusted. On the aspect of vicarious liability of the accused No.1, the learned counsel contended that there was no material on record to show that the accused persons had known that the deceased would be passing through the place of the incident and if at all there were any prior concert, the accused would not commit the crime in a bazaar and would rather select a desolate place where they can execute their plan. The incident appears to have suddenly occurred without any prior meeting of mind and therefore, the accused No.1 cannot be attributed with the intention or knowledge of causing death of Vasu. The learned counsel submitted that the trial Court was perfectly justified in acquitting the original accused no.1 of the charges which were levelled against him. In support of his contention, the learned counsel relied upon the decision of the

Supreme Court in Darshana Devi v. State of Punjab, reported in 1996 SCC (Cri.) 38, in which it was held that even though an oral dying declaration can form basis of conviction in a given case, such a dying declaration has to be trustworthy and free from every blemish and inspire confidence. The reproduction of the exact words of the oral declaration in such cases is very important. The difference in the exact words in the declaration would detract materially from the value of the oral dying declaration. Reliance was also placed on Ramesh Babulal Doshi v. State of Gujarat, reported in 1996 SCC (Cri.) 972 in which it was held that the mere fact that a view other than the one taken by the trial Court can be legitimately arrived at by the appellate Court on reappraisal of the entire evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless the Court comes to the conclusion that the entire approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. The decision of the Supreme Court in Hallu and others v. State of Madhya Pradesh, reported in AIR 1974 SC 1936 was also relied upon by the learned counsel for the same proposition. Reliance was also placed on the decision of the Supreme Court in Hari Ram v. State of Rajasthan, reported in 2000 SCC (Cri.) 1178, in which the Supreme Court, while holding that the power of the High Court while hearing acquittal appeals is wide and comprehensive, held that if, however, two views on the evidence are reasonably possible, one supporting the acquittal and the other indicating conviction, then the High Court would not be justified in interfering with the acquittal, merely because it feels that it would, sitting as the trial Court, have taken the other view.

7. The fact that the death of Vasu was homicidal is amply proved by the evidence on record. The evidence also shows that the incident in which Vasu was given knife blows took place in the evening around 8 o'clock on 20th November 1989 on the road somewhere near his house. The map which is at exh.8 shows the house of Ramjimal Thavardas, the father of the deceased, where the deceased used to reside with his brothers Parshottam and Bhagvandas. There is a lane known as `Taba Sheri' which was on the road known as `Ladi Road'. The incident is said to have taken place opposite the house of Manga Kala, about 3 feet away from the spot where the electric lamp-post is shown in the map. There is documentary evidence in form of an abstract of register which is at exh.54 which shows that, in the muster roll, the names of the accused Nos. 1 and 2 appear at Srl. Nos. 10 and 11

and they were doing the work of door-keepers in Chetna Cinema and further that they had taken half-day leave on the day of the incident.

8. Dr. Chandulal in his deposition exh.24 has stated that he was a medical officer in the Jetpur Government Hospital on 20th November 1989 and that Vasu was brought to the hospital by his brother Bhagvandas at 8.35 p.m. and on examining him, he had declared that Vasumal was dead. He did the post mortem examination of the dead body on 21-11-1989 at 7.30 a.m. and noted the following internal injuries thereon :

"[1] One skin injury on front of chest by sharp cutting instrument. It is superficial.

Direction : Mid point of base of neck to right shoulder about 6" in oblique cut blood stain.

(2) Stab wound on left mid axillary linear between left 7th & left 8th rib about 1" x 1/2" entrance.

Depth & Direction :

Slight oblique.

Medial to backward in left lung. No rib fracture detected. About 7.1/2" in length. Gradually became smaller.

Injury by wound :

Skin subcutaneus tissues muscles, left pleura left lung cut, its vessels upto medial margin of left lung."

He has stated that all these injuries were antemortem. Left lung had ruptured as noted in clause 20 of the post mortem notes. The cause of death was excessive haemorrhage due to injury on the left lung. This injury corresponded to the external injury No.2. According to the medical expert, the said injuries were possible by the muddamal knife article No.14. It was stated that a person would be able to live for about 10 to 15 minutes after receiving such injuries and would be in a position to speak for about 5 to 10 minutes after receiving them. In his cross-examination, he denied the suggestion that the injury No.2 can be caused only by a

weapon which had a longer blade. He has explained how this injury could be caused by giving a forceful blow with the muddamal knife.

9. In his deposition exh.10, the informant Bhagvandas has stated that, around 7.30 p.m. on 20-11-1989, he was sitting at the shop of his friend which was about 30 to 35 feet away from the place where the incident took place. He was told by two or three young boys who came there that his brother Vasu was being beaten near the entrance of their lane. He, therefore, immediately started running towards that place and when he reached there, he saw that there was an auto-rickshaw halting there in which a person was sitting on a driver's seat, while the accused No.1 - Natu was standing with a knife near the auto-rickshaw, and that his brother Vasu was lying on the road. Witnesses Hamir and Mohan were also standing there. According to this witness, when he made his brother stand up, he was told that the accused No.1 - Natu and the other person who was in the rickshaw had given him the knife blows. At that time, the accused No.1 - Natu got into the rickshaw and both of them had gone away. This witness, Hamir, Mohan and Pappu had helped his brother and taken him near his house and made him lie down there and thereafter, this witness brought the rickshaw and in that rickshaw, they took Vasu to the hospital, where on examining Vasu, the doctor declared him dead. Thereafter, the doctor had phoned up the police station and the policeman who had come to the hospital had recorded his FIR. He has further stated that, about 8 to 10 days prior to the date of the incident, the accused No.2 - Dilip had given his watch for repairs at the shop of his brother Parshottam and in respect of that watch, both the accused persons had quarrelled with Parshottam. This witness and his brother Vasu had, therefore, gone there and at that time, there was an altercation between Vasu and the accused persons. According to this witness, the accused persons had attacked Vasu with knife blows taking revenge of that incident. He has stated that he knew the accused No.1 Natu since about a year prior to the incident and that he was working as a door-keeper in the theatre. He has stated that he had identified both the accused persons in the test identification parade which was held two days after the incident by the Mamlatdar in his office. In his cross-examination, he has stated that he did not try to catch the accused persons. He has admitted that he had not stated in the FIR that when he had come, he had seen Natu with a knife near the auto-rickshaw, but he had stated that there was something like a knife in his hand. He has also admitted that he has not stated in his FIR

that Dilip had given a watch for repairs to his brother Parshottam and both the accused had a quarrel about it with him or that he had gone there. He has also admitted that, in his FIR, he had not given the description of the other person who was sitting in the rickshaw. He has denied the suggestion that he did not know the accused No.1. He has stated that when he reached the spot, Mohan and Hamir were already near Vasu. According to him, he asked them as to why Vasu was lying on the ground and they told him that he was injured with a knife.

9.1 Bhagvandas, obviously was not an eye-witness and it appears that he came to the spot after Vasu was injured and was lying on the ground. In his FIR recorded soon after the incident, he had stated that there was other person in the auto-rickshaw and did allege that both of them had assailed Vasu, but referring to the dying declaration said to have been made by Vasu to him, he had mentioned only the name of the accused No.1 Natu, door-keeper in Chetna Talkies as the assailant having been disclosed by Vasu. The fact that Natu was a door-keeper in Chetna Talkies is borne out from the muster roll exh.54 and also from the deposition of the Manager of the Cinema House. In the FIR, the previous incident of quarrel with Parshottam was attributed to the accused No.1 Natu. Bhagvandas had mentioned in the FIR that, because of that incident, the accused No.1 - Natu and the other person who was in the auto-rickshaw had caused the death of Vasu by giving him knife blows.

9.2 The deposition of Bhagvandas only establishes that the incident occurred after 7.30 in the evening on 20th November 1989, and that when he reached the spot, Vasu was lying on the ground injured and that he had seen the accused No.1 standing outside the rickshaw with a knife and thereafter, both the persons going away in the auto-rickshaw. He had also seen Mohan and Hamir near Vasu when he reached that place. On the aspect whether Vasu had disclosed to him the name of the assailant, we shall comment on his deposition after referring to the evidence of other witnesses, including the eye witness.

10. Mohanlal, who is the eye witness, has deposed at exh.11 that, on the day of the incident, around 7 o'clock, while he was at his house, Vasu had come and asked him to accompany him for a cup of tea. He and Vasu, therefore, went to a hotel named `Oghadpari' and after having tea, they were returning around 8 o'clock. While they were on their way, an auto-rickshaw came from behind and halted there. This witness saw the accused No.2 - Dilip getting down from the auto-rickshaw. Dilip

told Vasu why was he proclaiming all over the village that he had given a stick blow to him. Vasu replied that he had not given him any stick blow. Dilip thereupon got excited and raised his hand for beating Vasu. Therefore, this witness caught his hand. Thereupon, Dilip gave him a push and this witness fell down. Vasu and Dilip started grappling. The person who was sitting in the auto-rickshaw i.e. the accused No.1 Natu got down and caught hold of this witness and gave him a push from behind. This witness thereafter got up and went near Vasu to help him. At that time, Vasu was trying to get up but fell down. According to this witness, Dilip had given a knife blow to Vasu and therefore, Vasu had fallen down. The knife blow was given by Dilip on the side of the chest of Vasu. When he tried to make Vasu stand up, he saw that Vasu was bleeding from his wound. Thereafter, Hamir Manga who was his neighbour had come there. Bhagvandas also reached there. This witness asked Bhagvandas to bring an auto-rickshaw. Pappu Khatri had also come there. Vasu was carried and taken to his house and was made to lie down outside the threshold of the house. Thereafter, Bhagvandas brought the rickshaw and Bhagvandas alongwith Hamir and Pappu took Vasu to the hospital. This witness has stated that Vasu had talked to him about the quarrel which took place over the repairs of the watch which was given at the shop of Parshottam. He has stated that he had identified both the accused persons in the test identification parade conducted by the Mamlatdar. He has admitted that he did not know any of the accused persons before the incident. In his cross-examination, he has denied that there was no quarrel between the accused persons and the deceased at the site of the incident. He has stated that, after Vasu fell down, both the accused persons had immediately gone away. He then stated that Bhagvandas had come to the spot only after the accused persons had gone away. He also stated that when Bhagvandas came, he asked him as to what had happened to Vasu and he replied that Vasu was injured and that he should bring an auto-rickshaw. In paragraph 8 of his deposition, he has admitted that, on the next day after the incident, the police had apprehended the accused persons and had brought them in the locality and he was shown the accused persons at that time. On the next day, he was called at the Mamlatdar's office. He has denied the suggestion that he had not witnessed the incident.

10.1 From the deposition of this witness, it transpires that he was with Vasu at the time when the incident occurred and that, according to him, both these accused persons had come in an auto-rickshaw and the

accused No.2 - Dilip had given a knife blow to Vasu after he got excited, after the initial exchange of words between them. In view of his admission that he was shown the accused persons by the police a day prior to the identification, the fact of test identification will lose much of its evidentiary value. However, his evidence cannot be completely discarded merely because a day prior to the test identification parade, the accused persons who were arrested, were brought to the locality and he had seen the accused persons. His statement was already recorded by the police and he had given out the same version which he narrated before the Court on the material aspects of the matter. His police statement was recorded after midnight of the day of the incident i.e. much before the accused persons were arrested and brought in the locality where this witness resided. Therefore, his earliest version which reflects in his deposition without any material omissions being proved from his police statement recorded prior to the accused persons being shown to him on the next day, cannot be doubted.

11. Witness Hamirbhai, though not an eye-witness to the incident, is an important witness. In his deposition exh.13, he has allthroughout asserted that he had known both the accused persons since prior to the incident. He had identified both the accused persons in the test identification parade and there is no infirmity in the matter of his identifying both these accused persons. He has denied the suggestion that they were shown to him prior to the test identification. In fact, since he had known them by face since much prior to the incident, he was in a position to identify them soon after the incident when they were still at the place of the incident trying to go away in the auto-rickshaw. He has stated that, around 8 o'clock on the day of the incident, when he was returning to his house on a bicycle, he had seen that Vasu was lying on the ground and the two accused persons were at that time trying to go away in the auto-rickshaw. He asserts that he knew both these persons who were trying to run away by their face, though not by their names. They were serving in the Chetna Talkies and therefore, he had known them. He had seen a knife in the hands of one of these two persons. He has then stated that Mohan, Pappu and Bhagvandas had picked up Vasu and taken him near his house and at that time, Pappu had asked Vasu as to who were the assailants, and Vasu had stated that Dilip of Chetna Talkies had given him a knife blow. According to this witness, he had heard this statement made by Vasu. Bhagvandas had gone to take an auto-rickshaw and after he brought the same, Vasu was taken to the doctor. This witness had

accompanied them. He had seen the injuries on the chest and left side of the chest Vasu. He had then gone home and slept. On the next afternoon, he identified both the accused persons in the test identification parade held by the Mamlatdar. In his cross-examination, he has maintained that, because Vasu gave Dilip's name, that is why he came to know the name of the accused Dilip. The name of the other accused came to be known to him on the next day through Parshottam. He has denied the suggestion that there was no light at the time and place of the incident. He also denied the suggestion that Vasu was not in a position to speak at that time. He has denied that he had not seen the accused persons running away. He has stated that at the time when Vasu had stated that Dilip had given him a knife blow, Bhagvandas was not present since he had gone to fetch an auto-rickshaw.

11.1 From the deposition of Hamir, it transpires that he had already known both the accused persons and that soon after Vasu was given a knife blow and was lying on the ground just near the house of this witness, he had seen both the accused persons, one of whom was having a knife, going away in the auto-rickshaw, and that thereafter, he had heard Vasu stating that Dilip of Chetna Talkies had given him a knife blow.

12. The other witness, whose testimony has a bearing on Vasu's having given the name of Dilip as the assailant, is Keshav alias Kishan alias Pappu, who in his deposition exh.14, has stated that on the date of the incident, he was returning to the house and he saw that, near the lamp-post, there was an auto-rickshaw standing and some altercation going on. When he went nearer, the auto-rickshaw passed by him. He saw that it was driven by one person and the other was sitting in the back seat. He then saw that Vasu was lying on the road and Hamir, Mohan and Bhagvandas were present there. Hamir told Bhagvandas to bring an auto-rickshaw, and therefore, Bhagvandas went away. This witness, Hamir and Mohan took Vasu near his house. He has then stated that, at that time, Vasu had said that he was given a knife blow by Dilip of Chetna Talkies. After sometime, an auto-rickshaw was brought and, Bhagvandas and Hamir took Vasu to the hospital. He has stated that Vasu was injured on the left side of his chest. He has denied the suggestion that Vasu was not in a conscious state or that he had not spoken that Dilip of Chetna Talkies had given him a knife blow.

13. The cumulative effect of the deposition of Hamir

and Keshav is that, soon after he was injured, Vasu had given out the name of Dilip i.e. the accused No.2 as the person who had given him the knife blow. There is no reason to doubt these two witnesses on this aspect of the matter, because, the fact that the accused No.2 - Dilip had given a knife blow to Vasu is also borne out from the deposition of Mohan, who was accompanying Vasu at the time of the incident. Mohan has clearly stated that the accused No.2 got down from the rickshaw and had an exchange of words with Vasu and thereafter, they were grappling and then, he had given a knife blow to Vasu, as a result of which, Vasu fell down. None of these three witnesses implicate the accused No.1 beyond his presence near the auto-rickshaw alongwith the accused No.2. It is significant to note that the number of the auto-rickshaw - 992 was detected on that very night as Hamir reiterated even before the Court in paragraph 4 of his deposition exh.13 that the number of the auto-rickshaw that he saw was - 992. That auto-rickshaw was being plied by the brother of the accused No.2 as per the evidence on record. This circumstance seems to be important, because, the accused No.2 had brought the auto-rickshaw at the place of the incident alongwith the accused No.1 in it.

14. It is, in our opinion, clearly borne out from the version of Mohan, Hamir and Pappu that the accused No.2 had given a knife blow to Vasu, and that he was named by Vasu as the person who had given a knife blow to the earshot of Pappu and Hamir. It appears from the deposition of Hamir and Pappu that Bhagvandas had gone away to call the auto-rickshaw. It also transpires from the version of Mohan that Bhagvandas had reached the place after the accused had gone away. No witness speaks about disclosure of the name of the accused No.1 by Vasu before Bhagvandas except Bhagvandas. We are, therefore, not inclined to attach any importance to the deposition of Bhagvandas that he was told by Vasu that the accused No.1 - Natu had given him a knife blow. In view of the consistency about the involvement of the accused No.2 in the deposition of Mohan as well as in the dying declaration which Hamir and Pappu heard in which the accused No.2 - Dilip was named as the person who had given a knife blow to Vasu, we hold that the accused No.2 - Dilip had given the fatal blow. We stand re-assured on this aspect by the fact that the clothes which were discovered at the instance of the accused No.2 and worn by him at the time of the incident, were having blood stains, which were of the blood group of the deceased Vasu as per the report of the chemical analyser and serologist at exh.45. According to the investigating

officer, the muddamal knife was also discovered at the instance of the accused No.2 - Dilip and as per the serologist's report, there were blood stains of group `A' positive, which was of the deceased Vasu on the blade of that knife. Though even apart from this discovery of blood stained clothes and knife of the accused No.2, there is positive evidence to show his involvement in the crime. These circumstances, however, have a re-assuring effect. In our opinion, therefore, the trial Court was right in holding that the accused No.2 - Dilip had inflicted knife blows on Vasu, which resulted in his death.

15. Beyond the version of Bhagvandas, there is nothing on record to implicate the accused No.1 on the ground of his giving blow with a knife to Vasu. Even according to Mohan, who was the eye witness, it is Dilip who had started the attack on Vasu and at that time, the accused No.1 was sitting in the auto-rickshaw. Later he came out and gave a push to that witness, but it is not the say of the witness that the accused No.1 in any manner attacked Vasu. Even Bhagvandas has not attributed any blow to the accused No.1 and has stated that, he had simply seen him standing near the auto-rickshaw with a knife when he reached the place of the incident. That, however, is a doubtful matter, because, according to Mohan, Bhagvandas came at the place of incident after the accused persons had gone away. It cannot be said with certainty that Bhagvandas had seen them from some distance while coming to the place of the incident. Therefore, the matter lapses in the realm of doubt so far as the accused no.1 is concerned. It does appear that the accused No.1 was accompanying the accused No.2 in the auto-rickshaw, but there is nothing on record to indicate that they had any information about Vasu passing through the place of the incident at the time when it occurred. It would therefore be hazardous to infer that the accused No.1 shared the intention of the accused no.2 of giving a knife blow to Vasu. From the deposition Parshottam, the elder brother of Vasu, it appears that it was the accused No.2 who had given a watch for repairs at his shop. Therefore, if there was any dispute between the accused No.2 and Parshottam over the repairs of the watch, the motive aspect can hardly be attributed to the accused No.1. Merely because they were friends serving at the same Cinema Theatre as door-keepers, no inference of common intention can be drawn against the accused No.1. We, therefore, do not find any merit in the acquittal appeal filed against the acquittal of the accused No.1.

16. While the evidence clearly establishes the guilt

of the accused No.2 - Dilip, it would appear to us that the incident had suddenly occurred on a public road in the bazaar. While the accused No.2 and the accused No.1 were coming in an auto-rickshaw, they spotted Vasumal on the road. The accused No.2 halted his auto-rickshaw, got down and according to the deposition of Mohan, who had accompanied Vasu, Dilip had an exchange of words with Vasu. He told him as to why was he bragging everywhere in the village that he had given a stick blow to him and Vasu was denying having said such a thing. At that time, the accused No.2 got excited, as stated by Mohan, and there was grappling between the two. Mohan has also stated that when the accused No.2 tried to raise his hand to hit Vasu, he caught his hand and at that time, he was given a push which made him fall. It is not Mohan's case that Dilip emerged with a knife and straightaway gave a knife blow to Vasu. In fact, there was exchange of words and a fight, and thereafter, the knife blow seems to have been given by the accused No.2, which resulted in the death of Vasu.

16.1 As per Exception 4 to section 300 of the Indian Penal Code, culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel or unusual manner. As per the Explanation to Exception 4, it is immaterial in such cases which party offers the provocation or commits the first assault. The way in which the incident occurred, as narrated by Mohan who is the only eye witness, clearly indicates that the possibility of the incident occurring without premeditation in a sudden fight and in the heat of passion upon a sudden quarrel, cannot be ruled out. The accused No.2 had soon after giving the fatal blow, run away in the auto-rickshaw which he had brought. Therefore, he had not acted in a cruel or unusual manner so as to deny him the benefit of Exception 4 to Section 300 of the Indian Penal Code. Since the knife blow which resulted in death of Vasu was given on a vital part of the body and it was a very deep blow given with a great force which had ruptured the lung of Vasu, it is obvious that the act by which the death was caused was done with the intention of causing death or of causing such bodily injury as is likely to cause death. Thus, the offence that the accused no.2 is proved to have committed falls within the ambit of section 304 Part I of the Indian Penal Code. In this view of the matter, the conviction of the accused No.2 for the offence under section 302 Indian Penal Code needs to be altered to a conviction under section 304 Part I of the Indian Penal Code.

Consequently, the sentence of life imprisonment will not stand and having regard to the facts and circumstances of the case, we would direct that the accused No.2 should be sentenced to rigorous imprisonment for a term of ten years and pay a fine of Rs.1,000=00, in default to undergo a further rigorous imprisonment for three months, while setting aside the sentence of life imprisonment which has been imposed by the trial Court. The sentence of fine of Rs.500=00, in default to undergo simple imprisonment for fifteen days on the accused No.2 by the trial Court for the offence under section 135 of the Bombay Police Act, is maintained. We accordingly pass the following order:-

:: ORDER ::

[1] CRIMINAL APPEAL NO. 959 OF 1990 ::

(a) Criminal Appeal No. 959 of 1990 is partly allowed and the conviction of the appellant - accused No.2 - Dilip Amratlal is altered from section 302 of the Indian Penal Code to section 304 Part - I of the Indian Penal Code, and while setting aside the sentence of life imprisonment and fine imposed on him, he is ordered to undergo rigorous imprisonment for a period of ten years and pay fine of Rs.1,000=00, in default to undergo further rigorous imprisonment of three months for the offence under section 304 Part I of the Indian Penal Code.

(b) The sentence of fine as imposed by the trial Court for the offence under section 135 of the Bombay Police Act is maintained.

[2] CRIMINAL APPEAL NO. 1075 OF 1990 ::

The acquittal appeal is dismissed.

JULY 30, 2001 [R.K.ABICHANDANI, J.]

[SHARAD D. DAVE, J.]

parmar*